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No. 960



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

CHARLES KAUFMAN,
Petitioner.

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## PETITION FOR WRIT OF CERTIORARI.

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MAURICE EDELBAUM,
Counsel for Petitioner.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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## PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner petitioned the County Court of Kings County in the State of New York for an order vacating and setting aside a judgment rendered in said Court against him on March 6th, 1922 convicting him of the crime of Robbery in the Second Degree and sentencing him to not less than six nor more than fifteen years in State Prison, upon the ground that the petitioner, when arraigned upon said indictment, was not advised of his constitutional right to counsel and on the further ground that when this petitioner pleaded guilty to the crime of Robbery in Second Degree, in said court, on said indictment, he was not given the aid of counsel.

The County Court of Kings County, after a hearing on said application denied the application by order.

Petitioner now prays that a Writ of Certiorari issue directed to said County Court of Kings County in the State of New York to review the denial of said application, and to vacate and set aside said conviction.

## SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, in the County Court of Kings County brought a motion in the nature of *coram nobis* to vacate and set aside the judgment rendered in said court on March 6, 1922, convicting him of the crime of Robbery in the Second Degree and sentencing him to not less than six nor more than fifteen years in State Prison.

The Petitioner, on February 18th, 1922, while but eighteen years of age, was arrested by detectives and charged with the crime of Robbery. That on February 21, 1922, the petitioner was arraigned in the County Court of Kings County, State of New York, on an indictment charging him with the crime of Robbery in the First Degree, Grand Larceny in the Second Degree and Assault in the First Degree.

That the record in the court below does not disclose that the petitioner was advised of his right to counsel and the record affirmatively shows that the petitioner did not have the aid of counsel at any stage of the proceeding. The petitioner alleged in his petition to the County Court of Kings County and testified at the hearing upon said application that he was not advised of his right to counsel and that he did not receive the aid of counsel either at the time that he was arraigned upon the said indictment in the County Court of Kings County in the State of New York or at the time he pleaded guilty and was sentenced on said charge.

The State of New York, the Respondent herein, relied on the presumption or regularity which attaches to judgments of said County Court of Kings County. The petitioner however called as a witness the Honorable George W. Martin who was the Judge before whom the plea of guilty was taken and the Judge who sentenced the petitioner on said conviction to not less than six nor more than fifteen years, and it is the contention of the petitioner that by his testimony the presumption of regularity was destroyed and that from the records of the Court and from the testimony, the Court should have found that the Petitioner's rights, pursuant to Section 308 of the Code of Criminal Procedure in the State

of New York, and pursuant to Article 1, Section 6 of the New York State Constitution and pursuant to the Fourteenth Amendment of the United States Constitution had been violated and the conviction should have been set aside.

The Court below, in denying the application of the petitioner relied a great deal on the petitioner's criminal record which was accumulated subsequent to the conviction rendered on March 6th, 1922.

## REASONS FOR GRANTING WRIT.

The Court below denying the petition for the application had to find either that the petitioner had been advised of his rights or that he had waived his right to counsel.

It is the contention of the petitioner that the record of the Court below demonstrates beyond question that he was not advised of his right to counsel and that he did not waive his right to counsel and that the judgment that was rendered against him on March 6, 1922 was void and should be expunged from the record.

WHEREFORE, petitioner respectfully prays that this petition be granted.

CHARLES KAUFMAN,
Petitioner.

by MAURICE EDELBAUM,
Counsel.

Brooklyn, New York, November 14, 1946.

## CERTIFICATE.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

MAURICE EDELBAUM,
Counsel,
16 Court Street,
Brooklyn, New York.

Brooklyn, New York, November 14, 1946.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

CHARLES KAUFMAN,
Petitioner.

## BRIEF IN SUPPORT OF PETITION.

### JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code providing for a review by the Supreme Court by certiorari of a final judgment or decree of the highest Court of a State, in any cause where any title, right or privilege or immunity is especially set up or claimed under the Constitution of the United States. The order of the County Court of Kings County in this action is an order of a Court of the last resort or the highest Court of a State in which a decision can be had as there is no statutory authority for an appeal from such a final order to any higher State Court (*People* v. *Gersewitz*, 294 N. Y. 163).

## QUESTIONS PRESENTED.

Whether the County Court of Kings County on February 21, 1922, denied petitioner due process of law and violated Section 308 of the Code of Criminal Procedure of the State of New York and Article I, Section 6 of the New York State Constitution in not informing of his right to counsel and in not assigning him the aid of counsel.

Whether the County Court of Kings County on the 6th day of March, 1922, in imposing on petitioner a sentence of six to fifteen years in State Prison, without the assistance of counsel, deprived the petitioner of his liberty without due process of law, all in violation of the Constitution of the United States.

## STATEMENT OF THE CASE.

On February 21, 1922 the petitioner was indicted by the Grand Jury for the County of Kings in the State of New York for the crime of Robbery in the First Degree, Grand Larceny in the Second Degree and Assault in the First Degree. On the same day the petitioner was arraigned without counsel and pleaded not guilty to the indictment. He was not informed of his right to counsel nor was he given the aid of counsel. That on the 23rd day of February, 1922, petitioner was taken before Honorable George W. Martin, a Judge of the County Court of Kings County and withdrew his plea of not guilty and pleaded guilty to the crime of Robbery in the Second Degree. That at the time petitioner was not advised of his right to counsel, nor did petitioner have any counsel represent him. That petitioner thereupon was remanded for sentence and on March 6, 1922, petitioner was sentenced to not less than six years and not more than fifteen years in State Prison. That on the day of sentence petitioner did not have any counsel represent him nor was he advised of his right to have counsel. That petitioner was but eighteen years of age at the time of said arraignment and conviction and had never previously been convicted of any crime. That the petitioner, at no time, ever waived his right to have counsel.

## POINT I.

**THE RIGHT UPON ARRAIGNMENT, AND AT ALL STAGES OF THE PROCEEDINGS TO THE ADVICE OF COUNSEL AND TO THE AID OF COUNSEL IS JURISDICTIONAL AND THE COURT HAD NO AUTHORITY TO PROCEED UNTIL IT HAD ASKED THE DEFENDANT IF HE DESIRED COUNSEL AND ANY PROCEEDINGS THEREAFTER WERE VOID AND IN DEROGATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.**

It is well settled by Judicial rulings and Legislative mandate that where the accused appears at an arraignment without counsel, he must be asked if he desires counsel. It is not the function of the accused to see that this privilege is accorded him as he is not expected to know he is entitled to counsel but the Legislature of the State of New York has seen fit to enact an express statute placing such a duty on the judicial officer before whom he is arraigned to so advise him (Code of Criminal Procedure of the State of New York, Sections 8, 308). This benefit of counsel to one accused of a crime is a Constitutional guarantee. No distinction is made between the arraignment and any other stage of the criminal proceedings. It is the duty of the Court to accord the accused such right is positive and affirmative and cannot be ignored. To reassure the accused this constitution of prerogative, the New York State Legislature has made positive provisions for its protection by enactment of Section 308 of the Code of Criminal Procedure which reads in part as follows:

> "If a defendant appears for arraignment without counsel, he must be asked if he desires counsel, and if he does, the Court must assign counsel."

In *Glasser* v. *United States*, 315 U. S. 60, 76, the Court stated as follows:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Canizio* v. *People of the State of New York*, No. 152, October Term, 1945, decided in the Supreme Court of the United States, Mr. Justice Murphy stated as follows:

> "The constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of or experience in its application. He is ill-prepared to combat the arsenal of statutes, decisions, rules of procedure, technicalities of pleading and other legal weapons at the ready disposal of the prosecutor. without counsel, many of his elementary procedural and substantive rights may be lost irretrievably in the intricate legal maze of a criminal proceeding. Especially is this true of the ignorant, the indigent, the illiterate and the immature defendant. Powell v. Alabama, 287 U. S. 45, 69; Williams v. Kaiser, 323 U. S. 471, 474-476. Courts therefore must be unyielding in their insistence that this basic canon of justice, this right to counsel, be respected at all times."

## POINT II.

## THE RECORD DISCLOSES BEYOND QUESTION THAT THE PETITIONER DID NOT HAVE THE AID OF COUNSEL AND THAT THERE WAS NO WAIVER OF HIS RIGHT TO COUNSEL.

It has been well established by the logical and reasonable decisions of the higher courts, that a "waiver" constitutes the relinquishment or the abandonment of a known right

or privilege, so it must be conceded that, as at no time was petitioner informed, nor did he know or believe that he was entitled to the assistance of counsel, and at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; and because he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer, that petitioner did not waive his right to counsel. In fact the "Courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in loss of a fundamental right" (*Johnson* v. *Zerbst*, 304 U. S. 458). Nor can a presumption be sustained that a defendant knows of his constitutional right to the assistance of counsel, on this problem the Court, in *Evans* v. *Rives*, 126 F (2) 633, stated:

> "There is no more basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissibility of evidence, and the burden of proof, or other rules of substantive and adjective law, and the existence of such a presumption is negatived by the statement of the Supreme Court in Johnson v. Zerbst * * * that 'The purpose of the constitutional guaranty of right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights'."

When such a constitutional provision is designed solely for the protection of a citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will, by such a waiver the citizen relinquishes or refuses to accept only right belonging to him and him alone, but as such waiver must be defined as the intentional relinquishment of a known right with both knowledge of its existence, and the competent and intelligent intention to relinquish it, in the case of the petitioner who was totally ignorant of its existence he could

execute no such waiver. *Johnson* v. *Zerbst, supra; Bennecke* v. *Conn. Mut. Life Ins. Co.,* 105 U. S. 355; Cooley's Constitutional Limitations, 219; A plea of guilty constitutes no such waiver. *Walker* v. *Johnson,* 312 U. S. 275; *People ex rel. Moore* v. *Hunt,* 258 N. Y. App. Div. 24.

## POINT III.

### NOT ONLY MUST THE PRIMARY RIGHT TO COUNSEL BE PROTECTED BUT THERE MUST BE MADE A RECORD OF ALL PROCEEDINGS THAT HAVE A BEARING THEREON SO THAT AN INTELLIGENT REVIEW MAY BE HAD.

There is nothing in the record in the proceedings below that from which any Court can determine that there was a waiver of the petitioner's positive right to the aid of counsel.

Where there is a proper waiver should be determined by the record of the proceedings, it being appropriate that such a waiver would appear on the record as was said by the United States Supreme Court in *Johnson* v. *Zerbst, supra*:

> "The constitutional right of an accused to be represented by counsel invokes of itself, the protection of the trial court, in which the accused, whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is a proper waiver by the trial court, and *it would be fitting and appropriate for that determination to appear on the record.*" (Italics ours.)

The Court of Appeals of this state in definite and unambiguous language states that such a waiver *must* appear on the record. In *People* v. *McLaughlin,* 291 N. Y. 480, the Court said:

> "Not only must this primary right be protected, but *there must be a record of all proceedings that have a bearing thereon,* so that intelligent review may be had. The record before us does not show adequate protection of this defendant's rights, and so his conviction cannot stand. In such a situation, the absence of exceptions is no bar to a reversal. People v. Bradner, 107 N. Y. 1; People v. Miles, 289 N. Y. 360." (Italics ours.)

In *Glasser* v. *United States,* 62 Supreme Court 457, Mr. Justice Murphy, in delivering the opinion of this Court said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we must indulge every reasonable presumption against the waiver of fundamental rights."

WHEREFORE, petitioner prays that a Writ of Certiorari issue of this Honorable Court to the County Court of the County of Kings, in the State of New York, to review said cause and to expunge from its record the judgment entered against the petitioner on March 6, 1922.

Respectfully submitted,

MAURICE EDELBAUM,
Counsel for Petitioner.

## APPENDIX.

## NOTICE OF MOTION TO VACATE JUDGMENT.

COUNTY COURT,
KINGS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

CHARLES KAUFMAN,
Petitioner.

SIRS:

PLEASE TAKE NOTICE that upon the annexed verified petition of Charles Kaufman, duly verified the 9th day of February, 1946, the Indictment, and all the proceedings heretofore had herein, the undersigned will move this Court at a stated term, Part I thereof, to be held in the County Courthouse, 120 Schermerhorn Street, Brooklyn, New York, on the 26th day of February, 1946, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order vacating and expunging from the records a void judgment, which was entered on or about the 6th day of March, 1922, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York, February 16, 1946.

Yours, etc.,
MAURICE EDELBAUM,
Attorney for Defendant,
Office & P. O. Address,
16 Court Street,
Brooklyn 2, New York.

TO:

HON. MILES F. MCDONALD,
District Attorney,
Kings County,
Municipal Building,
Brooklyn, New York.

JOHN F. LANTRY,
Chief Clerk,
County Court

**PETITION.**

**COUNTY COURT,**

**KINGS COUNTY.**

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**THE PEOPLE OF THE STATE OF NEW YORK,**
**Respondent,**

**—against—**

**CHARLES KAUFMAN,**
**Petitioner.**

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**TO THE COUNTY COURT OF THE COUNTY OF KINGS:**

**The petition of Charles Kaufman respectfully shows:**

**1. That he is the petitioner in the above entitled action, and he is presently incarcerated in Auburn Prison, on a conviction rendered against him in the Court of General Sessions in New York County on the charge of Robbery.**

**2. That on March 6, 1922, I was convicted before Hon. George W. Martin, County Judge of the County Court of Kings County, on the charge of Robbery in the Second Degree. Upon my plea of guilty to said crime, I was sentenced to States Prison for a period of not less than six nor more than fifteen years.**

**3. I make this motion to set aside the said conviction rendered against me on March 6, 1922 on the ground that at the time of your deponent's arraignment on the charge of Robbery in the First Degree in the County Court of Kings County, your deponent was not advised and was not informed of his right to counsel.**

4. The following facts led up to your deponent's conviction before Hon. George W. Martin on March 6, 1922:

That on February 18, 1922, while your deponent was but 18 years of age living with his family at 421 Bushwick Avenue, in the Borough of Brooklyn, City and State of New York, he was arrested by Detectives Thomas Carroll and Robert Ferris of the 102nd Precinct and charged with the crime of Robbery. That on February 19, 1922, your deponent was arraigned before Hon. Harry Howard Dale, a Magistrate of the City of New York in the 5th District Magistrate's Court, in the Borough of Brooklyn, City and State of New York. That deponent had no attorney at the time representing him and waived the examination for the action of the Grand Jury. That the charge alleged that I had committed a robbery on February 13, 1922.

That on February 21, 1922, your deponent was arraigned in the County Court of Kings County on the charge of Robbery in the First Degree, Grand Larceny in the Second Degree and Assault in the Second Degree, before Judge MacMahon of said court. That deponent was not advised of his right to counsel and deponent did not have any counsel represent him at that time. That deponent pleaded not guilty to said indictment on that day. That on the 23rd day of February, 1922, two days later, your deponent was taken before Hon. George W. Martin, a Judge of the County Court of Kings County and withdrew his plea of not guilty and pleaded guilty to the crime of Robbery in the Second Degree. That at that time, deponent was not advised of his right to counsel, nor did deponent have any counsel represent him. That deponent was thereupon remanded for sentence and on March 6, 1922, your deponent was sentenced to not less than six nor more than fifteen years in Sing Sing Prison.

5. That on the day of sentence, your deponent did not have any counsel representing him nor was he advised of his right to have any counsel.

6. That from the time of my arrest on February 18, 1922, until the day I pleaded guilty on February 23, 1922, no one advised me that I had the right to have counsel at any stage of the proceeding.

7. It is deponent's contention that his constitutional rights were violated. That deponent should have been advised of his right to counsel and should have had counsel present at all stages of the proceedings.

8. That deponent at no time ever waived his right to have counsel.

WHEREFORE, petitioner prays that this Court cause to be issued an order vacating and expunging from the records the void judgment rendered against him on March 6, 1922, whereby he was sentenced to six to fixteen years in Sing Sing Prison, and/or that this Court order and direct that a hearing be had to inquire into the facts of the matters alleged in this petition, and that the petitioner have such other and further relief as to the Court may seem just and proper in the premises.

Dated: Auburn, N. Y., February 9th, 1946.

CHARLES KAUFMAN.

STATE OF NEW YORK,
COUNTY OF CAYUGA, } ss.:

CHARLES KAUFMAN, being duly sworn, deposes and says: That he is the petitioner in the within action; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES KAUFMAN.

Sworn to before me this
9th day of February, 1946.

HENRY F. SCHWARTZ,
Notary Public.

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STATE OF NEW YORK,
COUNTY OF CAYUGA, } ss.:

On this 9th day of February, 1946, before me personally appeared Charles Kaufman, to me known and known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

HENRY F. SCHWARTZ
Notary Public.

## ORDER.

At a Term of the County Court of Kings County, held at the Court House thereof, 120 Schermerhorn Street, Borough of Brooklyn, City of New York, on the 14th day of November, 1946.

Present: HON. LOUIS GOLDSTEIN, *County Judge.*

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

—against—

CHARLES KAUFMAN,
Defendant.

(Indictment No. 41802)

The above named defendant having moved this Court for an order vacating and setting aside a judgment entered in this Court on the 6th day of March, 1922, sentencing him to Sing Sing Prison for a term of six to fifteen years and said motion having come on to be heard on March 1, 1946, and the Court by order dated March 13, 1946 having directed that a hearing be held on said application and said hearing having come on to be heard before this Court on the 28th day of March, 1946, and the 4th and 9th days of April, 1946,

NOW, on reading and filing the notice of motion dated February 16, 1946, the petition of Charles Kaufman, verified the 9th day of February, 1946 submitted in support of said motion, and upon all other papers and proceedings heretofore had herein and after hearing the testimony of the defendant and the witnesses for the People and the Defendant, and due deliberation having been had, and upon filing the opinion of the Court, it is

ORDERED, that said application and said motion be in all respects denied.

Enter,

LOUIS GOLDSTEIN,
Judge of the County Court.

Granted
Nov. 14, 1946
FRANCIS J. SINNOTT,
Clerk.

## OPINION IN COURT BELOW.

(Reported in New York Law Journal, August 6, 1946.)

GOLDSTEIN, *J.*

This is a motion by the defendant for an order to vacate and set aside a judgment of this court convicting the defendant of the crime of robbery in the second degree, as a result of which he was sentenced to not less than six nor more than fifteen years in Sing Sing Prison on March 6, 1922, by the Hon. George W. Martin, County Judge.

Defendant claims that the proceedings on the indictment, up to and including his sentence, violated article 1, section 6, of the New York State Constitution, section 308, of the New York Code of Criminal Procedure and deprived him of his liberty without due process of law, in violation of the Fourteenth Amendment of the United States Constitution. It is his contention that he was not advised of his constitutional right to counsel at the time of arraignment on the indictment, and on the further ground that when he pled guilty to the crime he had no counsel and was not assigned counsel and that no counsel aided him in any step of the proceedings.

The application made by the defendant herein is the outgrowth of a recent decision rendered by the United States Supreme Court (Canizio v. People of State of N. Y., No. 152, October, 1945, Supreme Court of the United States, decided February 4, 1946).

This is one of numerous motions that have been made by other defendants as a result of the above decision.

There is no question in the court's mind that if the defendant's claims are correct, the motion must be granted. In line with the aforesaid decision, this court ordered the defendant brought down from Auburn State Prison for a hearing.

The facts as brought out on the hearing are as follows: The defendant testified that he was apprehended in Stamford, Connecticut, and thereafter returned to the police authorities in New York City. After being taken to a police precinct he was arraigned the following day before Judge

Dale in the Magistrates' Court, Fifth District, Brooklyn, with his co-defendant, Salvatore Fiorino. He at that time was asked whether he waived examination, and although he says that he did not know what that meant his answer was in the affirmative. However, the records in the Magistrates' Court, Fifth District, Brooklyn, indicate that in answer to the following question: "Do you require counsel? If you do, you will be allowed a reasonable time to send for him and the examination will be adjourned for that purpose." The defendant answered in the negative.

After indictment to the crime involved he was arraigned in the Kings County Court before Judge McMahon on February 21, at which time he pled "Not Guilty". Two days later, on February 23, 1922, he appeared before Judge Martin of this Court and pled guilty to the crime of robbery in the second degree. On March 6, 1922, he was sentenced to Sing Sing by Judge Martin.

Defendant says that from the time he was apprehended in Stamford, Connecticut, up to and including his sentence by Judge Martin, he was never advised of his rights to counsel; that no counsel was assigned to him and that he did not have the advice of any counsel. He says that the clerk of the court asked him if he pled guilty to robbery in the second degree but he kept quiet because he did not know whether to answer yes or no. His testimony as to that is as follows: "Q. Will you tell his Honor what occurred when you were brought before Judge Martin? A. The court clerk asked me if I pled guilty to robbery in the second degree. Well, I just kept quiet. I didn't know what to do, say yes or say no. And then they asked a fellow with me whether he pleads guilty to robbery in the second degree, and he said yes. And the two of us were led away. Then several days later I was brought up and received the sentence. Q. Before you were brought up and received the sentence, on that day that you were brought before Judge Martin, did Judge Martin or the clerk say to you, Do you desire the aid of counsel? A. No, sir. Q. On that day did anybody tell you that you were entitled to have counsel represent you on this charge of robbery in the first degree? A. No, sir.

Q. Did you know on that day that you were entitled to have any attorney represent you? A. No, sir * * *."

As I have indicated heretofore, the defendant was asked in the Magistrates' Court as to whether or not he desired counsel and stated that he did not. By the Court: "Q. You claim that even when you were before Judge Martin, you did not plead guilty? A. No, sir. I didn't open my mouth. Q. You did not say anything at all? A. I didn't say one word. Q. When the Judge sentenced you, did you call his attention to the fact that you did not plead guilty? A. I did not say anything. Q. Why not? A. I guess I didn't have the knowledge at the time. I didn't know what it was all about. All I know that I was led in and out of the court room."

The defendant says that he did nothing about his situation until he read the opinion of the United States Supreme Court in the Canizio matter. Since his conviction, the defendant as a result of a robbery conviction before Judge Taylor of this Court in 1927, served seven years and ten months in prison for that crime, and subsequent to that, as stated before, he is now serving his present sentence in Auburn State Prison. In both of these crimes he was represented by counsel.

The defendant refused to answer questions put to him by the court and the assistant district attorney as to whether or not he was guilty of the crime involved here, on the ground that it would tend to degrade or incriminate him. He refused to identify as his handwriting a statement that it is claims he wrote concerning his connection with the crime at the time he was apprehended by the police authorities in Stamford, Connecticut. He does not remember being questioned in the district attorney's office, which was then located at No. 66 Court Street, Brooklyn, N. Y., before the hearing in the Magistrates' Court.

Judge Martin testified as a witness in this proceeding. The other judges, that is, Judge Dale in the Magistrates' Court and Judge McMahon before whom the defendant was arraigned in the County Court, as well as the clerk who was assigned to Judge Martin's part of the County Court at the time the defendant pled guilty are dead. Judge Martin tes-

tified that it was not his custom to ask a defendant in every case that appeared before him whether or not that defendant desired counsel, and that as far as that was concerned, it largely depended on the facts and circumstances in the case and what the defendant said when his matter appeared on the calendar. He further testified that if a defendant desired to plead guilty, that he advised the defendant of his rights and then took his plea. He remembered many instances where defendants, after being asked if they wished counsel, saying that they did not want any counsel. In the instant case, Judge Martin says that a reading of the record indicated to him that the defendant was not represented by counsel at the time he pled guilty to the crime herein, but that did not mean that the defendant had not been asked whether he wanted counsel and had replied in the negative. However, Judge Martin testified that in every instance before permitting a defendant to plead guilty he satisfied himself by questioning the defendant, that the particular defendant knew the nature of the proceedings, and he was intelligent enough to understand what he was doing and cognizant of the punishment that would follow. It was only after he was satisfied as to that, that he would permit the defendant to plead guilty. He denies that under any circumstances would he sentence a defendant, if that defendant did not plead guilty, as claimed by the defendant in this instance.

The court, during the course of the hearing, and more particularly, the examination of the defendant, observed his demeanor and appearance on the witness stand. It has carefully considered the testimony adduced at the hearing, and is of the opinion that the defendant's claims, on which he bases the present motion, are not worthy of belief. It is the opinion of the court that in the present instance the defendant is attempting to fit and to manufacture facts similar to those appearing in the Canizio case. The court finds that the defendant has lied or has been evasive as to certain material facts, and for all of these reasons, the motion of the defendant is denied.

Submit order.